TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 404. 156

LEWIS WEITZEL, COLLECTOR OF INTERNAL REVENUE,
PLAINTIFF IN ERROR,

vs.

ROBERT W. CALDWELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED APRIL 19, 1878.

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INDEX.

	Original.	Print.
Petition	1	1
Precipe	5	3
Summons	5	3
Marshal's return	6	3
Answer	7	4
Journal entry: Jury sworn.	8	4
Journal eniry: Verdict	9	5
Journal entry: Order overruling motion for a new trial and stay of execution	10	5
Journal entry: Stay of execution	10	5
Journal entry: Bill of exceptions, signed, sealed, and allowed	11	5
Bill of exceptions	11	6
Clerk's certificate	19	11
Writ of error	20	11
Citation	22	12

1 At as tated term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court rooms in the city of Cincinnati on the first Tuesday of October, being the second day of that month, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and second. Present the honorable Philip B. Swing, district judge. Among the proceedings had were the following, to wit:

ROBERT W. CALDWELL, PLAINTIFF,
vs.
LEWIS WEITZEL, DEFENDANT. } No. 2507. Money.

Be it remembered that heretofore, to wit, on the 6th day of June, in the year of our Lord one thousand eight hundred and seventy-seven, came the said plaintiff, by his attorney, and filed in the clerk's office of said court his certain petition in said cause, clothed in the words and figures following, to wit:

Petition.

Circuit court of the United States, southern district of Ohio.

ROBERT W. CALDWELL, PLAINTIFF,
vs.
LEWIS WEITZEL, DEFENDANT. }

2 And now comes Robert W. Caldwell, plaintiff, and files this his petition against said the Lewis Weitzel, defendant, and says that on the sixteenth day of August, 1876, the honorable Green B. Baum, Commissioner of Internal Revenue, illegally and wrongfully assessed against plaintiff, as a distiller engaged in the business of distilling in the first collection district of the State of Ohio, an internal revenue tax of thirteen hundred and sixty-eight ($1,368.00) dollars as upon the product in spirits of an alleged excess of material used for the production of spirits over and above the producing capacity of the distillery of the plaintiff in the month of January, 1876, and caused the same to be forwarded and delivered to the said Lewis Weitzel as collector of the said collection district for collection.

Plaintiff says that it is not true that there existed any such alleged excess of material used over the actual and lawful producing capacity of plaintiff's distillery, but says that said assessment was illegal and oppressive, and plaintiff protested against the same.

Plaintiff further says that the said Lewis Weitzel, under authority of his said office, made demand upon plaintiff for said pretended taxes, and under compulsion of his said authority and to avoid distraint and seizure of his property, and protesting against the payment thereof, plaintiff did, on the 25th day of April, 1877, pay to the said Weitzel the said pretended taxes, to wit, the sum of thirteen and sixty-eight ($1,368.00) dollars.

Plaintiff further says that on the 23d day of May, 1877, he made and filed in due form of law application to the said Commissioner of Internal Revenue to refund and repay to him said sum so paid as aforesaid, which claim was, on the 29th day of May, 1877, rejected by said Commissioner, and plaintiff notified thereof by mail.

By reason of said premises plaintiff has become entitled to
3 claim and recover of the said defendant the said sum of thirteen hundred and sixty-eight ($1,368.00) dollars, with interest from the said 25th day of April, 1877.

Plaintiff further, by way of second cause of action, says that on the 19th day of September, 1876, the said Commissioner of Internal Revenue illegally and wrongfully assessed against plaintiff, as a distiller engaged in the business of distilling in the first collection district of Ohio, an internal revenue tax of thirteen hundred and sixty-eight ($1,368.00) dollars as upon the product in spirits over and above the producing capacity of the distillery of plaintiff in the month of May, 1876, and caused the same to be forwarded and delivered to the said Lewis Weitzel as collector of the said collection district for collection. Plaintiff says that it is not true that there existed any such alleged excess of material used over the actual and lawful producing capacity of plaintiff's distillery, but he says that said assessment was illegal and oppressive, and plaintiff protested against the same.

Plaintiff further says that the said Lewis Weitzel, under authority of his said office, made demand upon plaintiff for said pretended taxed, and under compulsion of his said authority and to avoid distraint and seizure of his property, and protesting against the payment thereof, plaintiff did, on the 25th day of April, 1877, pay to the said Weitzel the said pretended taxes, to wit, the sum of thirteen hundred and sixty-eight ($1,368.00) dollars.

Plaintiff further says that on the 23d day of May, 1877, he made and filed in due form of law application to said Commissioner of Inter-
4 nal Revenue to refund and repay to him said sum so paid as aforesaid, which claim was, on the 29th day of May, 1877, rejected by said Commissioner, and plaintiff notified thereof by mail. By reason of said premises plaintiff has become entitled to claim and recover of the said defendant the said sum of thirteen hundred and sixty-eight ($1,368.00) dollars, with interest from the said 25th day of April, 1877.

Wherefore plaintiff prays judgment against the said Lewis Weitzel in the sum of thirteen hundred and sixty-eight ($1,338.00) dollars, with interest from the 25th day of April, 1877, and of thirteen hundred and sixty-eight ($1,368.00) dollars with interest from the 25th day of April, 1877, and for his costs of suit hereon.

WARNER M. BATEMAN,
Attorney for Plaintiff.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Robert W. Caldwell, being first duly sworn, says that he is the plaintiff in the within named cause of action, and he believes the statements of the foregoing petition to be true.

ROBT. W. CALDWELL.

Sworn to before me and subscribed in my presence this 6th day of June, 1877.

THOS. AMBROSE,
Clerk U. S. C. C., S. D. O.

5 *Precipe.*

ROBERT W. CALDWELL
vs.
LEWIS WEITZEL.

The clerk will issue summons for the above named defendant, Lewis Weitzel, to Cincinnati, O. Indorse action for money only; amount claimed $1,368.00, with interest from April 25th, 1877, and $1,368.00, with interest from April 25th, 1877.

WARNER M. BATEMAN,
Attorney for Plaintiff.

And thereupon, afterwards, to wit, but on the same day and year aforesaid, there was issued out of the clerk's office of said court our certain writ of summons against the said defendant, clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon Lewis Weitzel, citizen of and resident in the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the third Tuesday in the month of June, 1877, to answer unto Robert W. Caldwell, citizen of and resident in the State of Ohio, in an action for money.

And have you then and there this writ.

6 Witness the honorable M. R. Waite, Chief Justice of the United States, this 6th day of June, A. D. 1877, and in the 101st year of the Independence of the United States of America.

Attest:

THOS. AMBROSE, *Clerk.*

And afterwards, to wit, on the 19th day of June, in the year aforesaid, came the said marshall, to whom the said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon in the words and figures following, to wit:

Received this writ at Cincinnati, O., June 6th, A. D. 1877, and served the within named in Hamilton County, as follows: Lewis Weitzel per. at 5.30 p. m., June 6th, 1877.

W. R. THRALL, *U. S. M.*,
By JNO. L. JEFFERIES, *Dept.*

And afterwards, to wit, on the thirty-first day of July, in the year aforesaid, came the defendant, by Channing Richards, his attorney, and, by leave of court first had and obtained, filed in the clerk's office of
7 the court aforesaid his certain answer in said cause, clothed in the words and figures following, to wit:

Answer.

Circuit court of the United States, southern district of Ohio.

ROBERT W. CALDWELL, PLAINTIFF,
vs.
LEWIS WEITZEL, DEFENDANT.

The defendant, Lewis Weitzel, denies that the assessment made against plaintiff by the Commissioner of Internal Revenue, on the 16th day of August, 1876, was illegal and wrongful, and says that an excess of material used over the actual & lawful producing capacity of plaintiff's distillery did exist as determined by said Commissioner.

And defendant denies that the assessment made against plaintiff by the Commissioner of Internal Revenue on the 19th day of September, 1876, was illegal and wrongful, and says that an excess of materials used over the actual & lawful producing capacity of plaintiff's distillery did exist as determined by said Commissioner.

CHANNING RICHARDS,
Att'y for Def't.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Lewis Weitzel, the defendant, being duly sworn, says that the
8 foregoing answer is true according to the best of his knowledge, information, and belief.

LEWIS WEITZEL.

Subscribed and sworn to before me this 31 day of July, 1877.

THOS. AMBROSE, *Clerk.*

And afterwards, to wit, on the 12th day of November, in the year aforesaid, an entry was made upon the journal of said court, in said cause, clothed in the words and figures following, to wit:

Jury sworn.

ROBERT W. CALDWELL
vs.
LEWIS WEITZEL. } Money.

This day came the parties, by their attorneys, and thereupon a jury being called came, to wit: W. H. K. Boake, Thomas Brown, James Coates, William T. Evans, Hugh Gibson, S. R. Hosmer, William Hamilton, George W. Jones, George Y. Miller, James C. King, S. P. Nickells and John Steel, who were duly empanneled and sworn well and truly the truth to speak upon the issue joined between the parties; and the evidence being finished, and counsel having concluded their argument, but the jury not having heard the charge of the court were adjourned until to-morrow morning at nine o'clock, to which time
9 this case is continued.

Whereupon the court adjourned until to-morrow morning at nine o'clock.

And afterwards, to wit, on the 13th day of November, in the year aforesaid, a further entry made upon the journal of said court, in said cause, clothed in the words and figures following, to wit:

Verdict.

ROBERT W. CALDWELL
vs.
LEWIS WEITZEL. } Money.

This day again came the parties, by their attorneys, and also the jurors heretofore empanelled and sworn herein, who, upon their oaths, do find the issue to be in favor of the plaintiff, and do assess his damages, by reason of the premises, at two thousand eight hundred and five dollars and forty cents.

It is by the court, therefore, considered that the plaintiff recover of the said defendant the said sum of two thousand eight hundred and five dollars and forty cents, together with $ his costs herein expended.

And afterwards, to wit, on the 8th day of December, in the year aforesaid, a further entry was made upon the journal of said court, in said cause, clothed in the words and figures following, to wit:

10 ROBERT W. CALDWELL
vs.
LEWIS WEITZEL. } Money.

This day came the attorney for the defendant, Channing Richards, esq., as also the plaintiff, by his attorney, W. M. Bateman, esq., and this case coming on to be heard upon the motion for a new trial, and the court, after the argument of counsel, and being fully advised in the premises, overrules said motion, to which order overruling said motion the defendant, by his attorney, e'cepts.

And it appearing that the defendant desires to carry the questions herein involved to the Supreme Court, it is ordered that execution be stayed until the further order of the court.

It is further ordered that the amount of the verdict herein be reduced to the sum of $2,736.00.

And afterwards, to wit, on the 13th day of December, in the year aforesaid, a further entry was made upon the journal of said court, in said cause, clothed in the words and figures following, to wit:

Stay of execution.

ROBERT W. CALDWELL
vs.
LEWIS WEITZEL. } Money.

The court finds that the defendant herein was an officer of the revenue, and that he acted in the performance of his official duty under the directions of the proper officer of the government in the acts com-
11 plained of herein. It is, therefore, ordered by the court that no execution issue against the defendant on the judgment recovered against him herein, so that the same may be provided for and paid out of the proper appropriation by the Treasury.

And afterwards, to wit, on the 11th day of January, in the year of our Lord one thousand eight hundred and seventy-eight, a further entry was made upon the journal of said court, in said cause, clothed in the words and figures following, to wit:

ROBERT W. CALDWELL
vs.
LEWIS WEITZEL. } Money.

And now comes Channing Richards, attorney for the defendant Lewis Weitzel, and presents to the court his bill of exception in said case, which is allowed by the court, signed, sealed, and ordered to be made part of the record.

Which said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

Circuit court of the United States, southern district of Ohio.

ROBERT W. CALDWELL, PLAINTIFF,
vs.
12 LEWIS WEITZEL, DEFENDANT.

Be it remembered that this cause coming on to be heard at the October term, A. D. 1877, of said court, before a jury, evidence was introduced by plaintiff tending to prove—

That previous to January 4th, 1876, the capacity of plaintiff's distillery was fixed by the survey at 1,140 bushels of grain each twenty-four hours, the fermenting period being forty-eight hours.

That on said 4th day of January, plaintiff went to the collector's office and notified the deputy in charge of distilleries that he desired to reduce his capacity one-third by closing three fermenting tubs of the nine then in use. The deputy gave him three blanks to sign, which he did, leaving them with said deputy, who filled up and filed the same, true copies of which said notices as filed are hereto attached as Exhibits A, B, and C. Said deputy thereupon closed and sealed the three tubs successively on the 4th, 5th and 6th, in accordance with said notices.

That on the 4th and 5th days of January, plaintiff mashed but 760 bushels of grain, but distilled the beer from 1,140 bushels of grain mashed upon the 2d and 3d. On each remaining day of the month he used the exact amount of grain fixed by the capacity. On the receipt of the distiller's return for said month the Commissioner of Internal Revenue made an assessment against him for an excess of grain used during said month, being the excess of grain used on said 4th and 5th days of the month over and above the reduced capacity specified in the notices above set forth, to wit, in excess of 1,013 33-100 bushels on
13 the 4th, and 887 67-100 bushels on the 5th.

That the mode of reducing capacity by giving three notices, and closing tubs on successive days after they had remained empty twenty-four hours, was the uniform practice in the first collection district of Ohio, until changed in accordance with circular No. 38 from the Commissioner of Internal Revenue, dated Feb'y 20th, 1877, and the distiller desiring to reduce capacity was required by the collector to give the three notices.

That another assessment was made under like circumstances for an alleged excess of grain used in the month of May, 1876, and both assessments having been paid to defendant as collector of internal revenue, this suit has been brought to recover the same.

That plaintiff reported all the spirits produced by him both months, and paid the tax thereon according to law.

The court thereupon charged the jury as follows:

"The conclusion to which I have arrived is that the producing capacity of this distillery was not in law reduced until the 6th day of January; that it continued for 4th and 5th days of January to be 1,140 bushels; and this being the amount of grain in fact used, there was no use of grain by the distiller in excess of the capacity of his distillery. The same reasoning and conclusions apply to the assessments for the 25th and 26th day' of May, 1876. The assessments were therefore illegal."

To which said charge the defendant, by his attorney, then and
14 there excepted.

And thereupon the defendant, by his attorney, asked the court to instruct the jury as follows:

"When the distiller gave notice in the form prescribed that he desired to reduce capacity on and after a day specified in the notice by closing a designated fermenting tub, and such tub was thereupon closed by the deputy collector in accordance with the notice, the legal effect was to reduce the capacity of the distillery on and after that day, and if the distiller, on or after that day, used grain in excess of the reduced capacity, although mashed before the reduction, the Commissioner was authorized to make an assessment for the excess, and the distiller cannot recover the same from the collector."

Which said charge was refused by the court, to which defendant, by his attorney, then and there excepted.

15 EXHIBIT A.

Notice of change in capacity.

126.—Revised April 13, 1876.

(In duplicate.)

(One copy to be forwarded to the Commissioner of Internal Revenue.)

JAN'Y 4TH, 1876.

L. WEITZEL,
Collector 1 District of Ohio:

SIR: Application is hereby made for change of capacity of my distillery No. 7, from 1,140 bushels of grain, producing 4,560 gallons proof spirits, to 1,013.33 bushels of grain, producing 4,053.32 gallons proof spirits, each twenty-four hours, from corn; bushels of grain, producing gallons of proof spirits, each twenty four hours, from rye; and gallons from molasses, by closing the following numbered fermenting tubs, changing the fermenting period from 48 hours to 48 hours, by varying the strength of the beer from 45 gallons per bushel to 45 gallons per bushel.*

Working capacity, in gallons.				Working capacity, in gallons.				Working capacity, in gallons.			
No.	Corn.	Rye.	Molasses.	No.	Corn.	Rye.	Molasses.	No.	Corn.	Rye.	Molasses.
5	17,100										

*NOTE.—Forty-five gallons of beer is the maximum number representing a bushel in the fermenting tubs, except in sour-mash distilleries, where sixty gallons is allowed.

Changes in capacity by changing the fermenting period or varying the strength of beer will be allowed only when the notice is accompanied by a new survey.

Total working capacity of tubs in use after the change, in gallons, from corn, 136,800.

Total working capacity of tubs in use after the change, in gallons, from rye .

To take effect on and after Jan'y 4th, 1876.

I will thank you to send the proper officer to close the tubs specified.

(Signed) R. W. CALDWELL, *Distiller.*

I certify that, on this the 4th day of Jan'y, 1876, I visited the distillery of R. W. Caldwell, No. 7, and caused fermenting tubs Nos. 5 to be closed by closing beer trough of same, in accordance with the above notice.

(Signed) E. C. URNER, *Deputy Collector.*

COLLECTOR'S OFFICE, 1 DISTRICT OHIO,
Jan'y 4, 1876.

I certify that the above application was complied with on Jan'y 4, 1876, by closing the fermenting tubs specified, changing the fermenting period, or authorizing the setting of beer at the strength specified, and that the capacity of said R. W. Caldwell's distillery No. 7 is, from that date, fixed at 1,013.33 bushels of grain and 4,053.32 gallons of proof spirits, each twenty-four hours, from corn; bushels of grain and gallons of proof spirits, each twenty-four hours, from rye; and gallons from molasses, in accordance with survey of said distillery, made by E. C. Urner, Sept. 20, 1875.

(Signed) LEWIS WEITZEL,
Collector.

16 EXHIBIT B.

Notice of change in capacity.

126.—Revised April 13, 1876.

(In duplicate.)

(One copy to be forwarded to the Commissioner of Internal Revenue.)

JAN'Y 4TH, 1876.

L. WEITZEL,
Collector 1 District of Ohio:

SIR: Application is hereby made for change of capacity of my distillery No. 7, from 1,013.33 bushels of grain, producing 4,053.32 gallons proof spirits, to 886.67 bushels of grain, producing 3,546.68 gallons proof spirits, each twenty-four hours, from corn; bushels of grain, producing gallons of proof spirits, each twenty-four hours, from rye; and gallons from molasses, by closing the following numbered fermenting tubs, changing the fermenting period from 48 hours to 48 hours, by varying the strength of the beer from 45 gallons per bushel to 45 gallons per bushel.*

*NOTE.—Forty-five gallons of beer is the maximum number representing a bushel in the fermenting tubs, except in sour-mash distilleries, where sixty gallons is allowed. Changes in capacity by changing the fermenting period or varying the strength of beer will be allowed only when the notice is accompanied by a new survey.

Working capacity, in gallons.				Working capacity, in gallons.				Working capacity, in gallons.			
No.	Corn.	Rye.	Molasses.	No.	Corn.	Rye.	Molasses.	No.	Corn.	Rye.	Molasses.
3	17,100										

Total working capacity of tubs in use after the change, in gallons, from corn, 119,700.

Total working capacity of tubs in use after the change, in gallons, from rye,

To take effect on and after Jan'y 5th, 1876.

I will thank you to send the proper officer to close the tubs specified.

(Signed) R. W. CALDWELL, *Distiller.*

I certify that, on this the 5th day of Jan'y, 1876, I visited the distillery of R. W. Caldwell, No. 7, and caused fermenting tubs Nos. 3 to be closed by closing beer trough of same, in accordance with the above notice.

(Signed) E. C. URNER,
Deputy Collector.

COLLECTOR'S OFFICE, 1 DISTRICT, OHIO,
Jan'y 5th, 1876.

I certify that the above application was complied with on Jan'y 5th, 1876, by closing the fermenting tubs specified, changing the fermenting period, or authorizing the setting of beer at the strength specified, and that the capacity of said R. W. Caldwell's distillery No. 7 is, from that date, fixed at 886.67 bushels of grain and 3,546.68 gallons of proof spirits, each twenty-four hours, from corn; bushels of grain and gallons of proof spirits, each twenty-four hours, from rye; and gallons from molasses, in accordance with survey of said distillery, made by E. C. Urner, Sep. 20, 1875.

(Signed) LEWIS WEITZEL, *Collector.*

17 EXHIBT C.

Notice of change in capacity.

126.—Revised April 13, 1876.

(In duplicate.)

(One copy to be forwarded to the Commissioner of Internal Revenue.)

JAN'Y 4, 1876.

L. WEITZEL,
Collector 1 District of Ohio:

SIR: Application is hereby made for change of capacity of my distillery No. 7, from 886.67 bushels of grain, producing 3,546.68 gallons proof spirits, to 760 bushels of grain, producing 3,600 gallons proof spirits, each twenty-four hours, from corn; bushels of grain, producing gallons of proof spirits, each twenty-four hours, from rye; and gallons from molasses, by closing the following numbered ferment-tubs, changing the fermenting period from 48 hours to 48 hours, by

varying the strength of the beer from 45 gallons per bushel to 45 gallons per bushel.*

Working capacity, in gallons.				Working capacity, in gallons.				Working capacity, in gallons.			
No.	Corn.	Rye.	Molasses.	No.	Corn.	Rye.	Molasses.	No.	Corn.	Rye.	Molasses.
7	17,100										

Total working capacity of tubs in use after the change, in gallons, from corn, 102,600.

Total working capacity of tubs in use after the change, in gallons, from rye, .

To take effect on and after Jan'y 6th, 1876.

I will thank you to send the proper officer to close the tubs specified.

(Signed) R. W. CALDWELL,
Distiller.

I certify that, on this the 6th day of Jan'y, 1876, I visited the distillery of R. W. Caldwell, No. 7, and caused fermenting tubs Nos. 7 to be closed, by closing beer trough of same, in accordance with the above notice.

(Signed) E. C. URNER,
Deputy Collector.

COLLECTOR'S OFFICE, 1 DISTRICT, OHIO,
Jan'y 6, 1876.

I certify that the above application was complied with on Jan'y 6, 1876, by closing the fermenting tubs specified, changing the fermenting period, or authorizing the setting of beer at the strength specified, and that the capacity of said R. W. Caldwell's distillery No. 7 is, from that date, fixed at 760 bushels of grain and 3,040 gallons proof spirits, each twenty-four hours, from corn; bushels of grain and gallons of proof spirits, each twenty-four hours, from rye; and gallons from molasses, in accordance with survey of said distillery, made by E. C. Urner, Sep. 20, 1875.

(Signed) LEWIS WEITZEL,
Collector.

18 Whereupon defendant tendered this his bill of exceptions and prayed that the same might be signed, sealed and allowed, and made part of the record, which is done accordingly.

In testimony whereof I have hereunto set my hand and seal this 11th day of January, A. D. 1878, being one of the days of said October term.

[SEAL.] PHILIP B. SWING,
Judge of the District Court of the United States for the Southern District of Ohio, sitting as Circuit Judge.

* NOTE.—Forty-five gallons of beer is the maximum number representing a bushel in the fermenting tubs, except in sour-mash distilleries, where sixty gallons is allowed. Changes in capacity by changing the fermenting period or varying the strength of beer will be allowed only when the notice is accompanied by a new survey.

19 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States, within and for the southern district of Ohio, hereby certify that the foregoing is a true and correct transcript of the record and proceedings in the case of Robert W. Caldwell vs. Lewis Weitzel, as the same remain in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 30th day of January, A. D. 1878, and in the 102nd year of the Independence of the United States of America.

Attest:
[SEAL.]

THOS. AMBROSE,
Clerk U. S. Circuit Court S. D. O.

20 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States within and for the southern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea which is in the said circuit court, before you, between Robert W. Caldwell, plaintiff, and Lewis Weitzel, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have same at the city of Washington, on the second Monday in the month of October next, in the said Supreme Court then and there to be held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the law and customs of the United States, should be done.

21 Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this eighth day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the 102nd.

Attest:
[SEAL.]

THOS. AMBROSE,
Clerk U. S. C. C., S. D. O.

22 UNITED STATES OF AMERICA, *ss:*

To Robert W. Caldwell, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the sixth judicial circuit and southern district of Ohio, wherein Lewis Weitzel is plaintiff, and you, Robert W. Caldwell, are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned

should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this fourth day of March, in the year of our Lord one thousand eight hundred and seventy-eight, and in the 102nd year of the Independence of the United States of America.

[SEAL.] PHILIP B. SWING,
District Judge holding the Circuit Court of the U. S. for the Southern District of Ohio.

I hereby acknowledge service of the foregoing citation for Robert W. Caldwell, the defendant in error.

Cincinnati, March 5, 1878.

WARREN M. BATEMAN,
Att'y for Defendant in Error.

(Indorsement on cover:) No. 404. Lewis Weitzel, collector of internal revenue, plaintiff in error, vs. Robert W. Caldwell. S. Ohio, C. C. U. S. Filed April 12, 1878.

OFFICE SUPREME COURT U. S.
FILED
JUL 14 1880
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 134. LEWIS WEITZEL *v.* GERHARD H. RABE.
No. 135. SAME *v.* AUGUSTUS KAYSER ET ALS.
No. 136. SAME *v.* ROBERT W. CALDWELL.

IN ERROR TO UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF OHIO.

BRIEF OF PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 134. LEWIS WEITZEL *v.* GERHARD H. RABE.
No. 135. SAME *v.* AUGUSTUS KAYSER ET ALS.
No. 136. SAME *v.* ROBERT W. CALDWELL.

IN ERROR TO UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF OHIO.

BRIEF OF PLAINTIFF IN ERROR.

No. 134.

STATEMENT.

Previous to May 2, 1876, the capacity of Mr. Rabe's distillery was fixed by the survey at 415.96 bushels of grain each twenty-four hours, the fermenting period being forty-eight hours. On that day he went to the collector's office and notified the deputy in charge of distilleries that he desired to reduce his capacity to 207.45 by closing *six* fermenting tubs then in use; he then, by agent, signed three blank notices given him by said deputy and left them with the deputy, who filled them up

and filed them. As shown by the copies printed in the record (pages 6 to 9) the notices when filed stated that Mr. Rabe desired to reduce his capacity from 415.96 to 346.29 bushels by closing tubs Nos. 3 and 8, having a capacity of 9,406 gallons, on and after May 2, 1876; from 346.29 to 276.03 bushels, by closing tubs Nos. 12 and 15, capacity 9,485 gallons, on and after May 3; and from 276.03 to 207.45 bushels by closing tubs Nos. 10 and 14, capacity 9,258 gallons, on and after May 4, 1876 (*Ib.*). Said deputy thereupon closed and sealed the six tubs successively on the 2d, 3d, and 4th, in accordance with said notices. On the 2d and 3d days of May, 1876, Mr. Rabe mashed but 207.45 bushels of grain, *but distilled the beer from* 415.96 *bushels* of grain mashed April 30 and May 1. On each remaining day of May the exact amount of grain fixed by the capacity was used. Upon receipt of the distiller's return for the month, the Commissioner of Internal Revenue made an assessment against him for an excess of grain used on the 2d and 3d days of May over and above the *reduced* capacity specified in the notices, viz, in excess of 346.29 bushels on the 2d and of 276.03 bushels on the 3d. This assessment was paid to Mr. Weitzel, the collector of internal revenue, and this suit brought for its recovery. The mode of reducing capacity by giving three notices, closing tubs on successive days after they had remained empty twenty-four hours, was the uniform practice in the first collection district of Ohio until changed in accordance with circular No. 38 from the Commissioner of Internal Revenue, dated February 20, 1877, and the distiller desiring to reduce capacity was required by the collector to give the three notices. Mr. Rabe reported all spirts produced by him during May, 1876, and paid tax thereon according to law. (Record, 5.)

In Nos. 135 and 136 the facts are identical, excepting the immaterial difference of names, dates, and amounts.

The instructions given and refused by the court upon this state of facts appear in the following

ASSIGNMENT OF ERRORS.

1. The court erred in charging the jury as follows:

"The conclusion to which I have arrived is, that the producing capacity of this distillery was not in law reduced until the 4th day of May; that it continued for the 2d and 3d days of May to be 415.96 bushels, and this being the amount of grain in fact used, there was no use of grain by the distiller in excess of the capacity of his distillery. The assessment was therefore illegal." (Record, 5, 6.)

[MEMO.—The above is extracted from the charge in No. 134. In Nos. 135 and 136 the language is the same except that in the former the dates are so changed as to substitute November 15, 1875, for May 4, 1876; and November 12 and 13 for May 2 and 3; and in the latter January 6 for May 4, and January 4 and 5 for May 2 and 3. The *legal effect* of the language used being precisely the same, it is assigned for error also in these last-named cases.]

2. The court erred in refusing to charge in substance according to this request of the district attorney: "When the distiller gave notice, in the form prescribed, that he desired to reduce capacity on and after a day specified in the notice, by closing a designated fermenting tub, and such tub was thereupon closed by the deputy collector in accordance with the notice, the legal

effect was to reduce the capacity of the distillery on and after that day, and if the distiller on or after that day used grain in excess of the reduced capacity, although mashed before the reduction, the Commissioner was authorized by law to make an assessment for the excess, and the distiller cannot recover the same from the collector." (Record, 6.)

[MEMO.—The above language, using no dates, was employed in the request in each of the three cases; so its refusal is assigned for error in each.]

BRIEF.

The question to be determined arises under this section of the Revised Statutes:

"SEC. 3311. Whenever any distiller desires to reduce the producing capacity of his distillery, he shall give notice of such intention, in writing, to the collector, stating the quantity of spirits which he desires thereafter to manufacture or produce every twenty-four hours, and thereupon said collector shall proceed, at the expense of the distiller, to reduce and limit the producing capacity of the distillery to the quantity stated in said notice, by placing upon a sufficient number of the fermenting tubs close-fitting covers, which shall be securely fastened by nails, seals, and otherwise, and in such manner as to prevent the use of such tubs without removing said covers or breaking said seals, and shall adopt such other precautions as may be prescribed by the Commissioner of Internal Revenue to reduce the capacity of said distillery." * * * *

Revised Statutes, section 3264, requires a survey of every distillery before operations are commenced therein, for the purpose of determining "its true spirit-producing capacity *for a day of twenty-four hours.*"

The estimate and determination is reached by ascertaining the aggregate cubic contents of the several fermenting tubs and the length of the fermenting period adopted. Once ascertained, this capacity cannot be varied without another survey, except by closing one or more of these tubs, according to section 3311, and by opening those so closed. Such changes, when made, *take immediate effect.*

Inasmuch, then, as the capacity of a distillery is re-

quired to be determined for a day of twenty-four hours, and is dependent each day upon the actually existing facts of that day, the capacity of any given day is a fixed and absolute quantity, not subject to transposition to another day, or to substitution for that of another day.

The sum of these several daily capacities of the working days of each month forms the total aggregate capacity of the distillery for that month.

It is with this total capacity for each month that comparison of the spirits reported as produced and of material reported as used in such month is made by the Commissioner, under section 3309, to determine—

1st. Whether any deficiency exists between the spirits reported and eighty per centum of such capacity; and,

2d. *Whether any material has been used in excess of such capacity.*

The capacity is, therefore, a measure less than eighty per cent. of which (in *spirits*) cannot be made, and more than one hundred per cent. of which (in *material*) cannot be used without assessment.

Revised Statutes, section 3309, in force when this cause of action arose, though subsequently modified by the act of March 1, 1879, on account of some supposed hardship in its operation, provided:

"SEC. 3309. On receipt of the distiller's return in each month, the Commissioner of Internal Revenue shall inquire and determine whether the distiller has accounted for all the grain or molasses used *and* all the spirits produced by him in the preceding month. If he is satisfied that the distiller has reported all the spirits produced by him, and the quantity so reported is found to be less than eighty per centum of the producing capacity of the distillery as estimated according to law,

he shall make an assessment for such deficiency at the rate of ninety cents for every proof gallon. In determining the quantity of grain used, fifty-six pounds shall be accounted as a bushel. *And if the Commissioner finds the distiller has used any grain* or molasses *in excess of the capacity of his distillery as estimated according to law*, he shall make an assessment against the distiller at the rate of ninety cents for every proof gallon of spirits which should have been produced from the grain or molasses so used in excess, *which assessment shall be made whether the quantity of spirits reported is equal to or exceeds* eighty per centum of the producing capacity of the distillery." * * *

By reason of the numerous cases, identical with these at bar, where there was an obvious legal liability without any actual intent on the part of the distiller to defraud the government, Congress passed this act of March 1, 1879:

"SEC. 6. That whenever, under the provisions of section thirty-three hundred and nine of the Revised Statutes, an assessment shall have been made against a distiller for a deficiency in not producing eighty per centum of the producing capacity of his distillery, as established by law, or for the tax upon the spirits that should have been produced from the grain, or fruit, or molasses found to have been used in excess of the capacity of his distillery for any month, as estimated according to law, such excessive use of grain, or fruit, or molasses having arisen from a failure on the part of the distiller to maintain the capacity required by law to enable him to use such grain, or fruit, or molasses without incurring liability to such assessment, and it shall be made to appear to the satisfaction of the Commissioner of Internal Revenue that said deficiency, or that said failure, whereby such excessive use of grain, molasses, or fruit arose, was not occasioned by any want of diligence or by any fraudulent purpose on the part of the distiller, but from misunderstanding as to the require-

ments of the law and regulations in that respect, or by reason of unavoidable accidents, then, and in such case, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal made to him, to remit or refund such tax, or such part thereof as shall appear to him to be equitable and just in the premises: *Provided*, That no tax shall be remitted or refunded under the provisions of this section upon any assessment made prior to January first, eighteen hundred and seventy-four: *Provided further*, That no assessments shall be charged against any distiller of fruit for any failure to maintain the required capacity, unless the Commissioner shall within six months after his receipt of each monthly report notify such distiller of such failure so to maintain the required capacity." (20 Stats., 340,341.)

Mr. Rabe's proper method of seeking relief was to apply to the Commissioner under this statute, which was passed because none could be had under pre-existing law.

The error, as I consider it, of the learned judge below arose from assuming the quantity of spirits a distillery did or could produce upon a given day as its legal "producing capacity" for that day; *i. e.*, that its actual capability of production is the proper basis of a correct assessment.

On the contrary, where there is no fraud, its liability to taxation depends upon the record and returns in the office of the assessing or collecting officer, and not upon facts to be shown by extrinsic evidence. The *survey* is primarily to be examined to determine capacity and liability, deducting therefrom tubs closed according to law, as of the day when they were so closed, after they had stood empty twenty-four hours. The survey states the number of tubs, the cubic capacity of each, and the

period of fermentation. In the present instance this period was the maximum for sweet-mash distilleries, forty-eight hours. (Record, 5 to 9; Exhibits A, B, and C.) Revised Statutes, section 3285: "Every fermenting-tub shall be emptied at the end of the fermenting period and shall remain empty for twenty-four hours." So three days elapse after such tub has been filled before it can be again filled. Then one-third the cubic capacity of all the tubs (if of uniform size) would indicate the spirit-producing capacity of the establishment for each and every working day of twenty-four hours. Its actual operations as reported must be compared with this estimate of its capacity. The sum of its capacity for each day is its monthly capacity. If on any one day grain is used in excess of its estimated capacity for that day an assessment must be made for that excess. In 1867 the frauds of distillers were so enormous that the total revenue from this source was but eighteen millions. Accordingly, the stringent law of 1868 was passed, the pervading spirit of which, apparent in almost every section and provision, was to induce *uniformity* in the operations of a distillery; that there should be the least possible honest fluctuation in its production.

In accomplishing this some provisions or regulations might practically work hardship occasionally, as in these cases; but this is incidental to the safe conduct and proper supervision of the business. The distillers named in these records might have avoided any tax above the spirit actually produced by closing all six tubs upon one day, after they had remained empty twenty-four hours.

Circular letter No. 38, of February 20, 1877, mentioned in the record (page 5, folio 14, ¶4) did not change any

existing law or regulation; it was issued to explain the meaning of the statute. It was as follows:

[Circular letter No. 38.]

To collectors, concerning the method of determining whether material has been used by a distiller in excess of capacity.

(1877. Department No. 29. Internal Revenue.)

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, February 20, 1877.

It is made the duty of the Commissioner of Internal Revenue by the Revised Statutes, section 3309, upon the receipt of the return of the distiller in each month, to proceed to inquire and determine whether the distiller has accounted for all the grain or molasses *used* and all the spirits *produced* by him in the preceding month, and also whether he has used any grain or molasses in excess of the capacity of his distillery *as estimated according to law.*

Special No. 165, bearing date September 6, 1875, proceeds upon the idea that a proper construction of the word *used*, in respect to grain or molasses mashed, is that such grain or molasses is used when alcoholic spirits, having been properly developed, are separated therefrom by distillation, and, to enforce this construction, declares that, in making this inquiry and determination, the quantity of material used each month would be ascertained by adding the quantity of material on hand in mash or beer at the beginning of the month to the quantity put into mash during the month, and deducting from the total the quantity on hand in mash or beer at the end of the month, the remainder being the quantity used during the month.

Under this rule, which is still in force, the material distilled during the month being the sum of the various quantities distilled on the several working days of the

month, is held to be the quantity of material *used* during the month.

The total capacity of the distillery for the month (expressed in bushels of grain or gallons of molasses, as the case may be), is the sum of the different daily capacities of the distillery for the several working days of the month.

The inquiry and determination as to the excessive use of material which the Commissioner is required by law to make is not a matter of discretion, but *rests solely in computation*, and consists in an arithmetical comparison of the quantity of material so found to have been used with the total capacity of the distillery for the month in question.

It will be observed that if the capacity of the distillery on each working day has been exactly equal to the material used, that is, *distilled* on that day, then the total capacity will equal the total material used, and no excess of material will be found; but if the capacity has on any day or days been less than the quantity of material used, that is, *distilled* on such day or days, then, unless there has been a corresponding and equal overplus of capacity on some other day or days of the same month, the total capacity will not equal the total material used, and an excessive use of material will be found, for which the statute requires an assessment to be made.

It will be further observed that when a distiller desires to reduce or suspend production, and commences mashing a smaller quantity of material daily, or ceases mashing altogether, *he cannot safely diminish capacity by closing the unused fermenting tubs until the larger quantities of material previously mashed have been distilled*, because, unless the aggregate capacity for the month equals the total material distilled during the month, an excess of material used must result, and be followed by an assessment equal to the tax on the spirits that should be produced from the quantity of grain used in excess of the capacity of the distillery for such month.

By preserving the larger capacity the distiller will not unduly expose himself to a deficiency in the production

of spirits, because the material distilled will be equal to the capacity maintained during distillation, and if a deficiency occurs, it will result from a failure to produce 80 per cent. of the amount of spirits required by the survey of such distillery to be produced from a bushel of grain or gallon of molasses.

When a change is made in the *kind* of material used, the change of capacity resulting therefrom will be deemed to take place on the day when the new material is distilled, so that the material and capacity may balance each other.

A careful observance of the instructions and explanations contained herein will, it is believed, prevent distillers from incurring assessments for excessive use of material arising from any reasonable misapprehension as to what their duties and liabilities are, and to this end you are requested to place a copy of this letter in the hands of every deputy collector, storekeeper, "storekeeper and gauger," and grain or molasses distiller in your district, and for this purpose you will make immediate requisition for a sufficient number of copies and distribute them at once upon receipt thereof.

GREEN B. RAUM,
Commissioner.

The foregoing circular states the law as we claim it should have been given to jury under the district attorney's request. The instruction given was diametrically opposed to this view.

EDWIN B. SMITH,
Assistant Attorney-General.